

1 PHILLIPS, GREENBERG & HAUSER, L.L.P.

JERRY R. HAUSER, SBN. 111568

2 ERIK C. VAN HESPEN, SBN. 214774

Four Embarcadero Center, 39th Floor

3 San Francisco, California 94111

Telephone: (415) 981-7777

4 Facsimile: (415) 398-5786

5 Attorneys for Plaintiff,

MOUNT & STOELKER, A PROFESSIONAL CORPORATION

8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA

10 SAN JOSE DIVISION

11 MOUNT & STOELKER, P.C.

CASE NO.: 08-CV-03660 RMW

12 Plaintiffs,

13 -v-

14 C-ONE TECHNOLOGY; PRETEC
15 ELECTRONICS CORPORATION

16 Defendants.

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' REQUEST FOR A
REMAND**

Date: September 19, 2008

Time: 9:00am

Ctrm: 6

17
18 **I. INTRODUCTION AND PROCEDURAL BACKGROUND**

19 On February 25, 2008, Plaintiff Mount & Stoelker, A Professional Corporation ("M&S") filed
20 a first amended complaint for declaratory relief, temporary restraining order and preliminary and
21 permanent injunction against defendant C-One Technology, a Taiwanese corporation ("C-One"), and
22 defendant Pretec Electronics Corporation, a California corporation ("Pretec") in the Superior Court of
23 the State of California in and for the County of Santa Clara, herein after referred to as the "State court
24 Action.". (Defendants' Exhibit C) In the complaint, M&S sought to enjoin an arbitration proceeding
25 commenced by C-One and Pretec against it from going forward. The primary basis for the action was
26 that no agreement existed between M&S, on the one hand, and C-One and Pretec, on the other hand,
27 to arbitrate the disputes in question. On February 26, 2008, M&S filed a motion for a preliminary
28 injunction in the State Court Action, which was served on C-One and Pretec's counsel, Leodis C.

1 Matthews. (Defendants' Exhibit D)

2 On or about March 11, 2008, C-One filed a pleading in the State Court Action entitled
 3 "Special Appearance by Defendant C-One Technology for the Limited Purpose of Challenging the
 4 Court's Jurisdiction to Hear Plaintiff Mount & Stoelker's Motion for Preliminary Injunction Due to
 5 Lack of Personam Jurisdiction Over Named Defendant C-One Technology." (Defendants' Exhibit I)
 6 The attorney for C-One was Mr. Matthews. On the same date, Mr. Matthews filed a pleading in the
 7 State Court Action entitled "Pretec Electronic Corporation's Opposition to Mount & Stoelker's
 8 Motion for Preliminary Injunction." (Defendants' Exhibit J) On March 26, 2008, the California
 9 Superior Court issued an order in the State Court Action granting the motion for preliminary
 10 injunction enjoining the arbitration from going forward effective upon the posting of an undertaking
 11 in the amount of \$5,000. (Defendants' Exhibit M) On April 2, 2008, plaintiff Mount & Stoelker
 12 posted an undertaking State Court Action (Defendants' Exhibit N) and as a result the arbitration was
 13 enjoined pending resolution of the state court proceeding.

14 On May 12, 2008, C-One and Pretec filed an action against M&S and Dan Mount in this
 15 court, Action No. C 08-2442 PJH, herein after referred to as the "Federal Action." The Federal
 16 Action set's forth all the claims asserted by C-One and Pretrec in the enjoined arbitration proceeding.
 17 The sole basis for jurisdiction for the Federal Action is diversity of citizenship. The defendants in the
 18 Federal Action have filed a motion to dismiss based on no jurisdiction to be heard on August 27,
 19 2008 at 9:00 am.

20 The sole basis for the removal petition is that "there is complete diversity of citizenship
 21 between C-One Technology, a Taiwanese corporation and both Mount & Stoelker, a California
 22 corporation and Daniel S. Mount, an individual who has domiciled in and citizen of the State of
 23 Californai." (Removal Petition, ¶ 6) There is no other basis for a removal jurisdiction set forth in
 24 petition. Incredibly, the defendants completely ignore the status of Pretec, which they admit is a
 25 corporation that was incorporated in the State of California and had its principle place of business in
 26 the State of California. Therefore, complete diversity does not exist between all of the named
 27 defendants, C-One and Pretec, and the plaintiff. In addition, removal is inappropriate pursuant to 28
 28 USC § 1441(b), even if somehow diversity jurisdiction exists, because Pretec is a California citizen.

1 Finally, despite the fact that C-One and Pretec appeared in the state court proceeding in March 2008,
 2 they waited until July 16, 2008, to serve their petition for removal, which is clearly more than thirty
 3 (30) days after their appearance in the state court action and therefore removal is not proper.

4 The grounds for removal jurisdiction clearly do not exist in this case and is not objectively
 5 reasonable under any standard. Under these circumstances, M&S is entitled to recover its costs and
 6 attorney's fees incurred in filing this motion pursuant to 28 USC § 1447(c).

7 II. LEGAL ARGUMENT

8 A. Complete Diversity Does Not Exist

9 If a case could have been commenced in federal court based on diversity of citizenship it can
 10 be removed from state court on this ground. 28 USC § 1441(b). As stated previously, the only ground
 11 set forth in the removal petition is diversity. The existence of diversity jurisdiction in this case is
 12 controlled by 28 USC § 1332(a)(3) which states:

13 The district courts shall have original jurisdiction of all civil actions
 14 where the manner and controversy exceeds the sums or value of
 15 \$75,000, exclusive of interest and costs and is between - ... citizens of
 different states and in which citizens or subjects of a foreign state are
 additional parties.

16 Defendants incorrectly assert that Section 1332(a)(2) applies, which is limited to when the
 17 action is only between a citizen of a State and a citizen of a foreign state. For purposes of determining
 18 diversity, defendants completely ignore Pretec which it cannot do. Under Section 1332(a)(3)
 19 diversity jurisdiction does not exist because Pretec is a California corporation. Diversity jurisdiction
 20 requires complete diversity of citizenship, **each** of the plaintiffs must be citizens of a different state
 21 than **each** of the defendants. *Allstate Insurance Company v. Devon Hughes* (2004, CA 9 Wash) 358
 22 F. 3d 1089, 1095. The fact that C-One is a foreign corporation does not salvage jurisdiction because
 23 diversity must be complete. *Nike, Inc. v. Comercial Iberica* (9th Cir. 1993) 20 F. 3d 987, 991. When
 24 an action is between citizens of the United States, the presence of alien parties is irrelevant for
 25 purposes of determining diversity jurisdiction. *Id.*; *Transure, Inc. v. Marsh and McLennan, Inc.* (9th
 26 Cir. 1985) 76 F. 2d 1297, 1298-1299.

27 In this case, according to defendants, the District Court would have had
 28 original jurisdiction over the case pursuant to 28 USC § 1332(a)(3) had
 it been filed in the District Court. That jurisdictional provision states

that a District Court has original jurisdiction of a civil action involving a claim the value of which exceeds the sum or value of \$75,000 so long as it is between “citizens of different States and in which citizens or subjects of a foreign state are additional parties...” Although it is not completely free from doubt, this statutory provision has been interpreted to permit the District Courts to disregard the citizenship of any foreign plaintiffs or defendants, for diversity purposes, **so long as there is at least one citizen of a state of the United States on each side of the case and there is complete diversity between those United States citizens.** See, e.g., *Tango Music, LLC v. Deadquick Music*, 348 F. 3d 244 (7th Cir. 2003); *Clark v. Yellow Freight Sys.* 715 F. Supp 1377 (E.D. Mich 1989); cf. *Allendale Mutual Insurance Co. v. Bull Data Systems*, 10 F. 3d 425 (7th Cir. 1993). **Under these decisions, the citizenship of the foreign plaintiffs and defendants is completely disregarded even if there is not complete diversity among the foreign citizens,** as is the case here. *Scotts Company v. Rhone-Poulenc S.A.*, 347 F. Supp. 2d 543, 545 (U.S. Dist. Ohio, E.D., 2004) (Emphasis added.)

A corporation is deemed a citizen of any state by which it had been incorporated and in the state in which it has its principle place of business. 28 USC § 1332(c)(1). The fact that Pretec may be defunct does not change the analysis to whether or not it is a California citizen. *Patel v. Sugan, Inc.* (ND CA 2005) 357 F. Supp. 2d 1098, 1111. Based on the allegations of the complaint, Pretec is a California citizen and therefore complete diversity does not exist. C-One’s status as a foreign citizen is irrelevant. Since there is no diversity between Pretec and defendants, this court clearly has no jurisdiction and the action must be remanded back to the state court.

B. Pretec’s Status as a California Citizen Makes Removal Improper

Even if there was complete diversity, removal is only allowed if “none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.” 28 USC § 1441(b). In this case, Pretec is a citizen of the state of California. Even though Pretec has not yet been served with a summons and complaint in the state court action, Pretec did make a general appearance on March 11, 2008, when it filed an objection to M&S’s motion for a preliminary injunction. Such general appearance satisfies the “joined and served” requirement of Section 1441(b). *Windac Corp. v. Clark* (DNE 1982) 530 F. Supp. 812, 813.

California Code of Civil Procedure Section 410.50 states that: “A general appearance by a party is equivalent to personal service of summons on such party.” Once a general appearance has been made, that party must respond as if service of process of the summons has been made. In *Factor*

1 *Health Management v. Superior Court* (2005) 132 Cal. App. 4th 246, the court held that an
2 opposition to an order to show cause for a preliminary injunction constitutes a general appearance.

3 “An order to show cause for a preliminary injunction is not within the
4 scope of Code Civ. Proc., § 418.11, which extends only to ex parte
5 applications for provisional relief. This is because a motion for a
6 preliminary injunction involves a determination related to the merits of
7 the case.” [citations omitted] *Id.* at 251.

8 Since Pretec has appeared in the State Court Action, removal based on diversity grounds is
9 impermissible.

10 **C. Defendants Failed to Seek Removal Within Thirty (30) Days of Their 11 Appearance in the State Court Action**

12 A defendant must file in the district court a notice of removal within thirty (30) days after
13 receipt of the first pleading in the state court action that sets forth the removable claim. 28 USC §
14 1446(b). The thirty day time period is triggered when the facts supporting the removal are evident on
15 the face of the complaint. *Harris v. Bankers' Life and Casualty Company* (9th Circuit 2005) 425 F.
16 3d 689, 694. Obviously, since C-One's petition for removal is solely based upon its status as a
17 foreign entity, its right to remove is evident on the face of the state court complaint. C-One asserts
18 that it has not yet been served, but its appearance in the state court action to oppose the motion for
19 preliminary injunction constitutes a general appearance, which is equivalent to service.

20 Even though C-One asserts that it was making a special appearance in the State Court Action,
21 it is settled law that where a defendant does not object to the process that has been issued or file a
22 motion to quash, but instead seeks a dismissal of the complaint on the grounds that the court is
23 without jurisdiction, such an appearance is a general appearance and not a special appearance.
24 *Roberts v. Superior Court* (1916) 30 Cal. App. 714; *Harrington v. Superior Court* (1924) 194 Cal.
25 185. *Morte v. Justice's Court* (1934) 139 Cal. App. 605. In this case, C-One was not seeking to quash
26 service, but requesting that the action be dismissed for lack of jurisdiction. Such a request is deemed
27 a general appearance. Even if C-One's appearance is considered a special appearance, once the court
28 denied C-One's request, C-One was obligated to file a response to the complaint under California law
as if served. California Civil Code of Procedure Section 586(a)(4).

Under California law, C-One was deemed served at the latest when the court denied its

1 opposition as set forth in its alleged "Special Appearance" on March 26, 2008. The 30 day period to
 2 file a removal petition expired at the latest on April 25, 2008. There is simple no excuse for this delay
 3 by C-One.

4 **D. M & S Is Entitled To Recover Its' Fees and Cost**

5 In granting a motion for remand, the court has the discretion to order the defendant to pay the
 6 plaintiff its "just costs and actual expenses, including attorneys' fees, incurred as a result of the
 7 removal." 28 USC § 1447(c). The standard for awarding fees is whether or not the removing party
 8 "has an objectively reasonable basis for removal." *Martin v. Franklin Capital Corporation* (2005)
 9 546 US 132, 136. It is not necessary to show that the removing party's position was "frivolous,
 10 unreasonable, or without foundation" for the award of fees. *Id.* at 138.

11 In this case, there is simply no basis to remove the state court action because it is abundantly
 12 clear that diversity jurisdiction does not exist. Defendants and his counsel could not reasonably
 13 believe that in determining diversity jurisdiction the status of Pretec as a California corporation is to
 14 be ignored. Further, the removal statute itself states that removal is inappropriate if one of the
 15 defendants is a citizen of the state from which removal is sought. Therefore, court should order C-
 16 One and its counsel to pay M&S the sum of \$6,630.00, as set forth in the Declaration of Jerry R.
 17 Hauser.

18 **III. CONCLUSION**

19 For the reasons set forth above, Mount & Stoelker respectfully requests that this court issue an
 20 order remanding this case back to the California Superior Court, County of Santa Clara and award
 21 sanctions against defendants and their counsel in the amount of \$6,630.00.

22 DATE: August 1, 2008

PHILLIPS, GREENBERG & HAUSER, L.L.P.

23
 24 By: 

JERRY R. HAUSER